No. 28.

Brief of Tillinghast for D. & E.

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~~OCTOBER TERM, 1899, No. 189.~~

28.

THEOPHILUS KING AND THE LIPPITT WOOLEN COMPANY,

PLAINTIFFS IN ERROR,

VS.

JOHN A. CROSS, ET. ALS.,

DEFENDANTS IN ERROR.

BRIEF FOR JOHN A. CROSS, DEFENDANT IN ERROR.

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vs.

JOHN A. CROSS, ET ALS.,
Defendants in Error.

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Our brief in this case was prepared for the last term before Chicago, Rock Island & Pacific R. R. Company vs. Sturm, 174 U. S., 710, was decided.

But, while that case, as we understand it, covers and concludes all questions raised by the plaintiffs in error here, we deem it better to file the brief as it is.

JAMES TILLINGHAST,
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Attorneys for Defendant John A. Cross.

Supreme Court of the United States.

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No. 186.

BRIEF FOR THE DEFENDANT IN ERROR, JOHN A. CROSS.

I.

Several preliminary questions arise upon this record which it is submitted dispose of the case.

The record discloses, (foot of page 153), as follows: "And now, "at this said present session of this said Common Pleas Division, said "petitions for a new trial are all dismissed by said Appellate Division, "and said case remitted to this said Common Pleas Division *for further* "*proceedings*, and *by agreement* judgment is entered by the court, Doug- "las J. to wit, upon the 14th day of December A. D. 1895, upon said "verdict for said plaintiff for the sum of $55,822.06 debt, and his costs

"of suit, taxed at $189.70, of which said sums said Lippitt Woolen "Company garnishee is charged as trustee of the said defendants to "the extent of $16,421.26, and all other trustees are not charged."

(*a.*) From such a judgment a writ of error will not lie; error does not lie from a judgment *by consent* :

United States v. Babbitt, 104 U. S. 767.
Pacific R. R. v. Ketchum, 101 U. S. 289.
Erlanger v. Southern Pac. R. R. Co., 109 Cal. 395.
Hendrick v. Minor Lumber Co., 71 N. W. Rep. 483, (Mich).
Bolles v. Cantor, 6 App. Div. (N. Y.) 365.

(*b.*) The judgment of the Appellate Division was not final:

1. It remitted the case to the Common Pleas Division, "*for further proceedings.*"

Error does not lie from such an order :

Wagner v. Charleston, 151 U. S. 360
Clark v. Kansas City, 172 U. S. 443 (43 Law Ed. 467)
California National Bank v. Stateler, 171 U. S. 447.
Bostwick v. Brinkerhoff, 106 U. S. 3.
Buck v. Hamilton, 99 Ill. 507.

2. The defendants below, Brown, Steese & Clark, do not join in this writ of error; and, of course, could not. Having appeared and pleaded in bar, and exhausted their remedies in the state court, involving no Federal question, the judgment there was conclusive upon them.

Fitzgerald &c. Co. v. Fitzgerald, 137 U. S. 98.

And under the state statute and practice the charging order upon the plaintiff in error the Lippitt Woolen Company, was not a judgment. Unless voluntarily submitted to it could be enforced only by a new action directly against that Company :

Public Statutes of R. I., 1882, Ch. 208 Sec. 13 (Record p. 23).
Eddy v. Prov. Machine Co., 15 R. I. 7.

The dicta in Moshassuck Felt Mills v. Blanding, 17 R. I. 298, to the effect that the charging order amounts to a judgment are misconceived and misleading. For in both the cases there referred to, viz; of a trustee or garnishee answering and disclosing funds, and of one not answering, the statutes are express, that it can be enforced against him only by a new action after judgment obtained against the principal defendant. No execution can issue upon that judgment to be enforced against the trustee.

See Sec. 13 and 18, Record p. 23.

II.

If the case goes further the remainder all turns upon the question, where at the time of the attachment, and *for the purposes of the attachment*, was the *situs* of the debt due from the trustee or garnishee, the Lippitt Woolen Company, to Brown, Steese & Clark.

The facts upon which this question rests are these.

On August 13, 1889 John A. Cross, the plaintiff below, a citizen and resident of Rhode Island, commenced his action at law in assumpsit in the Court of Common Pleas of that state against Brown, Steese & Clark, citizens and residents of Massachusetts, and co-partners doing business in Boston, to recover upon two promissory notes given by them for $20,000 each. The writ was served on the same day in trustee process or foreign attachment, in the manner prescribed by the statutes of Rhode Island, upon the Lippitt Woolen Company, a Rhode Island corporation carrying on business there, for the purpose of attaching the debt due from it to the defendants Brown, Steese & Clark, and it is that debt thus attached, or sought to be attached, by Cross which is here in question.

Pursuant to the statute, copies of Cross's writ with notice of the attachment were duly sent by mail to the defendants Brown, Steese & Clark, who afterwards appeared and pleaded in bar in the case, and such proceedings were had that a verdict and final judgment were

obtained by Cross against them, with a charging order upon the Lippitt Woolen Company, as trustee or garnishee. (Printed record pp. 152-153).

King the plaintiff in error here had intervened in the action claiming title to this attached debt under the following circumstances. On August 12, 1889, the day before Cross commenced his action in Rhode Island, Edward Steese and Amasa Clark, members of the firm of Brown, Steese & Clark had filed their voluntary petition in the proper insolvency court of Massachusetts praying that their firm might be adjudged insolvent, upon which petition citation issued to Brown and was served upon him August 14 to appear August 21 ; and on this last day the firm was adjudged insolvent, and the publication of notice required by the Massachusetts statutes,—and from which time those statutes provide that the proceedings shall date and take effect,—was made on August 23, 1889, ten days after the service upon the Lippitt Woolen Company in the Rhode Island action. (Printed record pp. 69 to 73 and 130).

Assignees were appointed, and King claims title under a purchase from them November 19, 1890. (Record pp. 85 to 88.)

His title will thus be seen to rest entirely upon the Massachusetts insolvency proceedings.

It is true that he sought to bolster up his claim by a judgment of the Superior Court of Massachusetts. But that rested upon the same title and was attempted to be brought into this case only under the constitutional provision requiring faith and credit to be given to the judgments of the courts of other states, a matter which will be considered later.

As stated above it is beyond question that the judgment of the Rhode Island court finally determined the rights of the parties as between Cross and Brown, Steese & Clark.

And the plaintiff in error, the Lippitt Woolen Company, as trustee or garnishee therein, can have no interest except to see that its indebtedness to Brown, Steese & Clark is properly discharged to avoid

any double liability. But this, could there be any question about it as matter of law, was most carefully guarded against not only by the judgment of the Superior Court itself, (Record p. 26), but also by the bond of indemnity given to the Woolen Company, (Record p. 36). Aside therefore from the fact that these proceedings were plainly collusive, and especially coupled with that fact, it is submitted that this company has no standing here.

The only substantial questions therefore concern the claim of the plaintiff in error King. These, so far as they are open to him in this court, are set out in his petition for a new trial in the state court, (Record pp. 103 to 109), and may be summarized as follows :—

1. That the Rhode Island proceedings impaired the obligation of the contract between the Lippitt Woolen Company and Brown, Steese & Clark.

2. That the Rhode Island court failed to give full faith and credit to the insolvency proceedings, and to the judgment of the Superior Court, of Massachusetts.

3. That the Rhode Island court obtained no jurisdiction over the fund attached because that fund was not within the reach of its process, and that the later appearance and defense by Brown, Steese & Clark had no effect to give jurisdiction over the fund as against the claimant King, and therefore, that as against him, the proceedings in the state court were without due process of law.

To these contentions the Rhode Island court answered :

1. That the proceedings did not impair the obligation of the contract within the prohibition of the Federal Constitution.

2. To the second contention the court made two answers :

(a.) That it acquired jurisdiction prior to the Massachusetts proceedings in insolvency and prior to the service of the writ upon which was based the judgment in the Superior Court of that state, and that neither of those proceedings could operate to divest it of its jurisdiction thus first obtained :

(b.) And even were this not so, that the insolvency proceedings

were in the nature of a system of bankruptcy and had no extra-territorial force; and therefore that the title conferred by them would not, or at least need not, be recognized in another state.

3. To the third contention it answered that the *situs* of the attached debt, at the time of, and for the purpose of the attachment, was in Rhode Island; and therefore that the court acquired jurisdiction over it to subject it to the judgment afterwards obtained in the action.

FIRST

The Impairment of the Obligation of the Contract.

This question, as raised and stated upon the record, (p. 108, a), impugned only the action of the state court.

It was no where claimed that the statute of Rhode Island itself was in conflict with the Constitution. The only claim was that the state court wrongly construed the state statute as embracing attachments against non-residents. In other words, as stated by this court speaking through Mr. Justice Gray, in Central Land Company v. Laidley, "the question submitted to and decided by the state court "was one of construction only and not of validity:"

> Central Land Co. v. Laidley, 159 U. S. 103.
> Commercial Bank v. Buckingham, 5 How. 317, 341.
> Lawler v. Walker, 14 How. 149.

And even if under these decisions there could be any possible question, it seems to be fully concluded by the decision of this court in Reynolds v. Adden, 136 U. S. 348, where it is said in the opinion that this question was there raised. There is no question but that the statute here in question was in force long before this contract was made

and if it can be held void upon the ground under consideration, so must every other state statute authorizing attachments in garnishment of debts due to non-residents.

SECOND.

THE FAITH AND CREDIT DUE TO THE MASSACHUSETTS PROCEEDINGS.

(a.) If the Rhode Island court by the service of its process obtained jurisdiction over the debt and fund attached, either prior in point of time to the Massachusetts insolvency proceedings and the process of the Superior Court of that state, or because the insolvency proceedings had no effect outside of Massachusetts, there is an end of this question. Nothing that took place after the Rhode Island attachment could then deprive its court of that jurisdiction:

Wallace v. M'Connell, 13 Pet. 136.
Moran v. Sturges, 154 U. S. 256.

The question whether the debt sought to be attached was within Rhode Island for the purposes of the attachment, so as to give its courts jurisdiction over it will, as indicated above, be discussed later.

But assuming this, there would seem to be no question of faith and credit to be given to the Massachusetts proceedings, and indeed no such federal question involved in the case. The finding below is not a general finding that the court has jurisdiction, which we may concede would not be conclusive, but a finding of facts which, if true, gave jurisdiction to the Rhode Island courts as a matter of international law, by its right by priority to control the disposition of the property it had seized.

This finding by the court below that its process was earlier in point of time was purely a finding of facts which this court will not review upon writ of error:

Egan v. Hart, 165 U. S. 188.
Dower v. Richards, 151 U. S. 658.

If it be said that these findings or either of them involved a consideration,—it can hardly be said construction,—of the Massachusetts statutes, yet that will not alter the case. For this court will not review the construction given by the courts of one state to the statutes of another state :

Glenn v. Garth, 147 U. S. 360.
Lloyd v. Matthews, 155 U. S. 222.
Turner v. Comm. of Wilkes County 173 U.S. 461

It will of course be borne in mind that Cross, the plaintiff below, was never a party in any way to the Massachusetts proceedings either in the insolvency court or in the Superior Court, and was therefore in no way bound by them.

Ward v. Mount Pipe Mfg. Co. 42 L.R.A. 706 Conn.

(b.) Again the state court found that the insolvency system of Massachusetts is a system of involuntary insolvency, and therefore that proceedings under it, or resting upon it, were of no avail outside of Massachusetts as against the plaintiff Cross, a non-resident of that state and a citizen of Rhode Island, and also that no question of faith and credit to be given to those proceedings under the Federal Constitution arose in the case, a finding that is fully sustained by the cases in this court and elsewhere cited in the opinion, (Record p. 140).

And see the earlier cases of :

Blake v. Williams, 6 Pick 286.
Topham v. Chapman, 1 So. Car. Const. Rep. 283,
and Jones v. Blanchard cited at p. 285, (1785).
Wallace v. Patterson, 2 Har. & M'H. 463.
Burk v. M'Clain, 1 Har. & M'H. 236.
Taylor v. Geary, Kirby 313, (1787).

Security Trust Co. v. Dodd 173 U.S. 624

THIRD.

We proceed, therefore, to consider the remaining question, which, as stated above, is really the only Federal question, if any, involved in the case, viz.:—

DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT.

The first question that here arises is what is the test by which it is to be determined what is due process of law, or, as it is otherwise stated, the law of the land? The test must be found either in those fundamental principles of right and justice universally recognized in the systems of jurisprudence of civilized nations, or more narrowly in those principles and practices of international law recognized as proper and right under the laws of England from which the several states have derived their judicial systems, particularly as they were exercised and recognized by the colonies as adapted to their needs at the time of the adoption of the Constitution, and by the states at the time of the adoption of the fourteenth amendment:

Den ex dem Murray v. The Hoboken Land &c. Co., 18 How. 272.
D'Arcy v. Ketchum, 11 How. 165.
Davidson v. New Orleans, 96 U. S. 97.
Dent v. State of West Virginia, 129 U. S. 114, 123-124.
Hilton v. Guyot, 159 U. S. 113, 180.
Lowe v. State of Kansas, 163 U. S. 81, 85.

As said by this Court speaking through Mr Justice Gray in the last case cited; "Whether the mode of proceeding, prescribed by "this statute, and followed in this case was due process of law, depends "upon the question whether it was in substantial accord with the law "and usage in England before the Declaration of Independence, and "in this country since it became a nation, in similar cases."

The question therefore really reduces itself to this:— The several states being independent and foreign one to another, except as

restrained and limited by the Federal Constitution, (Pennoyer v. Neff, 95 U. S. 714 at 722), what is due process of law with respect to the attachment of debts due to non-residents tested by the principles of international law as recognized by the law of England and by the American colonies and states? The general practice of such attachments and their general recognition as valid exercises of jurisdiction under the principles of international law, indicate that there is nothing fundamentally unjust in them. And it requires very little knowledge of the law as recognized and practiced by the American colonies, to answer the question whether thus tested this attachment was made according to the law of the land as then and ever since understood by the American courts. But some review of this subject may assist in showing to what extent this right was recognized and practised upon, as well as where and within what narrow bounds the question here in issue has been raised, especially in recent years, in the state courts.

It may be well to point out first, however,—we will recur to it later,—that if the debt payable to a non-resident may be attached according to the international law generally recognized and practiced when the Constitution was adopted,—that is if the attachment of such debts then formed a part of the law of the land,—no argument from analogy as to the *situs* or *locus* of personal property for purposes of taxation, distribution, &c, &c, can avail the plaintiff here. The question in this court is merely whether such attachments were generally recognized as valid and legal so as to have been then properly a part of the law of the land, without any regard to what that law may have been in other respects and under different circumstances.

A. Attachment of Debts in English Law.

The attachment of debts due from a resident to a non-resident was well known from early times in the lower courts of England, particularly in the Mayor's Court of London as a custom of London. It was not however confined to London:

See Note to 1 Man. & Grang, 41.
Neale v Cottingham, 1 Hy. Black 132-133, Note;
Also 4 T. R. 189; (Attachment in Dublin 1764).

In fact it appears to have been in early times quite extensively practiced in the lower courts of England. And it is quite probable that it is from their acquaintance with its operation in these courts, with which they undoubtedly came most in contact, that the American colonists borrowed it as a part of their law:

See Gray J. in Jarvis v. Mitchell, 99 Mass. 530.
Sergeant on Attachment, Introduction p. 7, Note, (2d Ed.)

There can be no doubt that the Custom of London extended to the attachment of a debt due to a non-resident; in fact the proceeding was originally designed to compel the appearance of the defendant who was otherwise beyond the reach of process.

Thus in Tamm v. Williams, 3 Doug. 281, (Edition of 1831), decided in 1783, Lord Mansfield is reported as saying (p. 283):

"The very essence of the custom, is, that the defendant shall not "have notice; because it is a proceeding against an absent man, who "cannot be found and has nothing to be summoned by. It is a pro- "ceeding *in rem*, like confiscations in the exchequer."

And again (p. 284):

"The money due follows the person of the debtor; therefore the "garnishee must be within the city.

"Davenport, (and Buller J. assented); The custom goes to goods "in the city though the garnishee be elsewhere.

"Lord Mansfield agreed, and said that was the distinction between "goods and a debt owing."

And not only were such attachments from early times well known and practiced as a part of the English law, but they have always been recognized by the English courts as a valid exercise of jurisdiction by foreign courts under the principles of international law. This is the more noticeable at the present day as the tendency in England appears to have recently been to confine the jurisdiction under the Custom of London to as narrow limits as possible.

Thus foreign attachments of debts due Englishmen were recognized as valid in :

Chevalier v. Lynch, Doug. 170, (Lord Mansfield, 1779).
(Attachment in St. Christopher.)
Gould v. Webb, 4 E. & B. 933, 13th Plea, (1855).
(Attachment in New York.)

And within a very few years the same question raised by the plaintiff here has received a thorough examination as a matter of international law by the English courts :

In re Queensland &c. Co., L. R. 1892, 1 Ch. 219.

And see the same case below, L. R. 1891, 1 Ch. 536, where the argument from the maxim that personalty follows the domicile of its owner, *Mobilia personam sequuntur*, used here by the plaintiffs, was more especially considered.

And note the statement of the Scotch law by eminent Scotch barristers, (L. R. 1892, 1 Ch. 223), to which the Court of Appeals gave effect as valid within the principles of international law, to wit : "That "assuming the facts stated to be correct, then, according to the "law of Scotland and the *jus gentium* as administered in the Courts "of Scotland, the said arrestments will have priority over the assign- "ment of the debentures notwithstanding the fact that the creditor "in the debts is domiciled in Queensland, and the place of payment "of the debts in England, whatever the local law of those countries "may be as to the necessity of intimation to the debtor to perfect the "assignment."

See also London Ry. Co. v. Lindsay, 3 Macq. 99. (App. Cas. 1856-1861.)
North v. Stewart, L. R. 15 App. Cas. 452.

B. Attachment of Debts in the American Colonies.

In the American Colonies, at least in those belonging to England, the attachment of debts due to non-residents appears to have been nearly universal, although the cases also enforce the principle, affirmed

by this court in Cole v. Cunningham, that an English resident could not evade the bankruptcy laws of that country by going abroad to avail himself of the foreign attachment law:

Sill v. Worswick, 1 Hy. Black 665, 666-689. (Attachment in St. Christopher, 1782, See pp. 666, 689).

Beckford v. Turner, cited 4 T. R. 188, and 193, Cockpit 1785. (Attachment in Jamaica).

Kymer v. Larkin, 5 Bing 71.
(Attachment in Hayti 1819).

M'Intosh v. Ogilvie, cited 4 T. R. 193, n.
(Arrestment in Scotland, Tem. Ld. Hardwicke).

It appears also to exist in French Law:

Locke on Foreign Attachments, p. 1, Note.

Cazenove v. Prevost, 5 Barn & Ald. 70.

And in various other foreign systems:

Bar's International Law, p. 534, Note on §§119-120.

It is certainly difficult, and probably impossible, to now trace the origin and growth of these attachment laws in the thirteen original colonies. Attachments of both tangible and intangible property undoubtedly existed very early in their histories, and generally, if not always, were first adopted with regard to debts due to, and property owned by, non-residents, an interesting fact in view of this case.

The following, made up from such authorities as are accessible, and from lack perhaps of better and fuller sources of information not as comprehensive as could be wished, will yet serve as an indication of how generally the process of garnishment was employed in the American colonies.

According to the Duke of Yorke's Book of Laws, (see edition published by authority of the General Assembly, Harrisburg 1879, at page 10), process of attachment against the goods of debtors out of the jusrisdiction was provided in 1676 in all territories subject to his government.

In New York in addition to the Duke of Yorke's Laws the garnishment of debts due to non-residents was distinctly provided for as early as 1751 at least, (Colonial Laws of New York p. 445 &c. Chap. DCCCCVIII. §10; and see §6).

And in Grants and Concessions of New Jersey, by Leaming and Spicer, abuses in attachments against absconding debtors were regulated in 1683, evidently having existed before, (see 2d. Ed. p. 476).

Garnishment of debts due absconding debtors existed for several years before 1748, (see Preamble to Chap CI, Laws of New Jersey Vol. 1, p. 395), and the revised act of 1798 contained express provisions against non-residents, (Chap. DCCXII §26 of 1798; also Revision of 1800, p. 300). It has been found impossible with such authorities as are at hand to trace this latter provision to an earlier date. But it is said to have been originally a separate statute, (Depue J. in LeSage vs. Schmidt, 10 N. J. Law Journal 10).

In Pennsylvania in 1699, (Duke of Yorke's Laws, Supra, at pp. 289, 290), it was provided that writs of attachment issued "pursuant to anie Customs of cities or corporatians in England or according to anie Custom or usage in these parts of America," should be valid, and distinctly provided that they should not be issued except against non-residents, or those about to remove to some other colony or place, or those refusing to give sufficient security for their debts.

In 1705, (1 Laws of Pennsylvania p. 60, Chap. CXLIII), the statute expressly provided for garnishment proceedings of both tangible and intangible property, and against both residents and non-residents, and an amendment of 1723 made a distinction between attachments of the property of residents and non-residents.

See Sergeant on Attachments, p, 3.
Also Barnet's case, 1 Dall. 152.
Stevenson v. Pemberton, 1 Dall. 3.

And the English case of Phillips v. Hunter, 2 Hy. Black 402, grew out of a Pennsylvania attachment of a debt in 1784.

In Maryland garnishment of debts due to non-residents was provided for in 1715, (Laws of Maryland revised by Wm. Kilty, 1799, Vol. 1, Chap. XL), and supplemented in 1795, (see 4 Griffith's Law Reg. 944).

And see Wells v. Gheselin, 1 H. & M'H. 91, (1737).

In Virginia a process of garnishment of debts due non-residents by injunction in equity was provided for as early as 1744, (5 Hen. Stats. at large 220).

Carr J. in Kelso v. Blackburn, 3 Leigh at p. 306.

See also Hamilton v. Hudson cited in argument in 4 T. R. 187.

An anonymous case cited in Waring v. Knight, 1 Cooke's Bank. Laws, at p. 308.

In North Carolina garnishment of debts due non-residents existed in 1777, (Laws of North Carolina by Judge Iredell, 1791, p. 301 § 25 and p. 302 §27 a), and probably earlier, since Judge Iredell was directed to leave out acts repealed or obsolete, (Ibid p. 609), and these sections occur in a general act establishing courts and regulating legal proceedings.

South Carolina had a very full and complete act permitting attachment of debts due non-residents as early as 1712, (Statutes of South Carolina, Vol. 2, p. 588), and again in 1744, (Vol. 3, p. 616).

In Georgia, attachments of debts due non-reisdents existed as early as 1761, (Digest of Laws of Georgia by Robert and George Watkins, Philadelphia 1800 p. 67).

COMING NOW TO THE NEW ENGLAND COLONIES.

In Connecticut it was provided by the code of 1650, "that attachments to seize "uppon any man's lands or estate bee onely graunted for, or against, such goods as "are foreigner's, and doe not dwell or inhabitt within this jurisdiction," (The Code of 1650 printed by S. Andrus & Son of Hartford, without date, p. 22).

And the digest of 1784, (p. 34), contains an elaborate act for garnishment of both tangible and intangible property expressly including, (near end), debts due to non-residents.

See Treadway v. Andrews, 20 Conn. 384, 392-393.

In New Hampshire an act was passed in 1719 regulating attachments of goods or *estate* and providing in §2 for continuance of the proceedings and surety where the defendant was not an inhabitant or sojourner, (Acts and Laws of His Majesty's Province of New Hampshire in New England, Portsmouth 1771, at page 144). And the statute in "Laws of New Hampshire 1797" at page 153 et seq., (said in the margin and again at the end to have been passed in 1791), contains essentially the same provisions where the principal defendant is a non-resident, (see p. 157), and extends in express terms to "money, goods, chattels, rights or credits of any debtor," (see p. 153).

In Massachusetts attachments in suits against strangers seem to have been made as early as 1659; (Ancient Charters and Laws of Massachusetts Bay printed in 1814, Chap. XCIII, at page 193).

In 1671 it was enacted by the Colony of Plymouth that henceforth attachments should not be released upon appearance of the defendant, but should stand until

the execution granted upon the judgment should be discharged, (Plymouth Colony Laws, Dutton & Wentworth, 1836, p. 255, §14), and in Sec. 11, beginning on the next prior page "the common usage of this Court in ordinary cases, not to allow "Attachments on any Goods or other Estate, where the person can be found to be "responsible to the Plaint," is amended by giving the Court or Magistrate liberty to grant them.

In 1700 the practice with respect to attachments of goods and *estate* of residents and non-residents was regulated, (Acts & Laws of Mass. Bay & Charter 1692–1798, p. 122).

And finally attachment of debts due non-residents was still more clearly provided for in 1758, (Ancient Laws &c. and supra, p. 614, &c., where the term "credit" used in §2 near end, and in §§3, 4, 5 and 6, is to be noted). The Act of 1795, (Acts of 1794–5, p. 120, Chap. 65), revising the subject did not change its effect either as to the classes of property or persons upon which it operated.

Gray J. in Jarvis v. Mitchell, 99 Mass. 530.

In Rhode Island attachment of debts due to non-residents was distinctly provided for by Act of May, 1745, (Digest of 1744–5, p. 302), as follows:

"Whereas it often happens that Persons indebted, remove or dwell out of this "Colony, or conceal themselves therein, so that neither their Bodies can be arrested "nor their Estates attached in the ordinary Method of Law:

"For Remedy Whereof: Be it enacted by the General Assembly, and by the Au- "thority thereof, That when any Person hath removed or dwells out of this Colony, or "conceals himself therein, the personal Estate of such Person lodged or lying in the "Hands of his or her Attorney, Agent, Factor, Trustee, or Debtors, shall be liable "to be attached to answer any just Debt;" and providing that service of a copy of the writ upon "any Person or Persons who have such personal Estate in their "Hands" shall oblige such person to render an account of such property. The last paragraph of the Act refers to an earlier act of 1736, which besides providing for the attachment of the real estate of any persons "whose Bodys or Personal Estate "cannot be found within this Colony, * * * in the Same Manner as has "been heretofore customary to attach Personal Estates," further provided, "That "when any Person is absent or out of the Colony as aforesaid, the Personal Estate "of such Person, lodged in the Hands of any Inhabitant, shall be liable to Attach- "ment to answer any just debt." And see the preamble of the same Statute.

And there are still earlier references to the process of attachment generally, (see Digest of 1719, p. 95, and Digest of 1730, p. 100.)

The first volume of Rhode Island Reports, (containing the earliest reported cases of its courts), contains only a few cases before 1849 and none earlier than 1828. But the English cases of Mawdesley v. Parke,

cited in 1 Hy. Black, pp. 680-681, 686; and Hunter v. Potts, 4 T. R. 182; grew out of attachments of debts due to foreigners made in Rhode Island before 1770 and in 1785 respectively.

It is well known to the Rhode Island courts and bar that it was not until 1870 that any attachment either of tangible or intangible property, real or personal, was allowed by the statutes of the state so long as the defendant was within the state, unless indeed it may have been permitted in very early colonial times, but has always been allowed as to all kinds of property including debts at least since 1745 against non-residents.

And besides these statutory provisions of the several colonies, it is believed that such process very early existed by custom and as a part of the law brought from England. There are indications in several of the early statutes and their preambles which seem to warrant such a conclusion.

C. American Cases Since the Constitution.

It is impossible within the limits of a brief to trace this question through all of the statutes and decisions of the courts of the several states since the adoption of the Constitution. But the attachment of debts due to non-residents is believed to have always existed to a greater or less extent in all or certainly in very nearly all of the states, (See Griffith's Law Register published in 1821–1822, Vols. 3 and 4, question 132 under the names of the several states).

And down to the year 1890 when the case of Missouri Pacific R. R. Co. v. Sharitt was decided by the Kansas Supreme Court, (43 Kans. 375), there is believed to be no reported case in any state which even seriously questioned the validity of such an attachment *although there were a number of cases in which the garnishee was held to be not liable because not served within the state of his residence.* (Compare the Custom of London as stated by Lord Mansfield in Tamm v. Williams, 3

Doug. 281, Supra). This absence of adverse decision is not due to the fact that the question was not raised, for it has been a number of times. But the decisions have always been against the plaintiffs' contention here.

See Blake v. Williams, 6 Pick. 286.
Embree v. Hanna, 5 Johns, 100.
Saunders v. Williams, 5 N. H. 213.
Dunlap v. Rogers, 47 N. H. 281, 287.
Morgan v. Neville, 74 Pa. St. 52.
H. & St. J. R. R. Co. v. Crane, 102 Ill. 249.
Wyeth &c. Co. v. Lang, 127 Mo. 242.
Pomeroy v. Rand, McNally & Co. 157 Ill. 176, 185–186.
Bragg v. Gaynor, 85 Wis. 468.
Berry Bros. v. Nelson Davis & Co., 77 Tex. 191.

And the validity of such proceedings has been repeatedly assumed by this Court:

Kennedy v. Brent, 6 Cranch 187.
Brashear v. West, 7 Peters 608, 617 (5).
Mattingly v. Boyd, 20 How. 128.
Wallace v. M'Connell, 13 Pet. 136, 151.
Fitzgerald &c. Co. v. Fitzgerald, 137 U. S. 98.
Cooper v. Reynolds, 10 Wall. 308 at 317.

See Green v. Van Buskirk, 5 Wall. 307, 314.
Cole v. Cunningham, 133 U. S. 107.

D. Interstate Corporations as Garnishees.

We might stop our review of the cases at this point. It has been shown, we think, that the question here presented is one of international law, or at least of comity; that the attachment of debts due to non-residents is, and always has been, recognized by that law and by the law of England as a valid exercise of jurisdiction; that it was

generally authorized and practiced in all of the colonies at the time of the adoption of the Constitution, and in all of the states at the time of the adoption of the 14th amendment; and that it must, therefore, be regarded as due process of law under the Constitution.

Nevertheless because of the confusion, more seeming than real, recently introduced into the decisions of the state courts in a particular class of cases *where the garnishee is a corporation carrying on business in more than one state*, and because an examination of those cases will show how little there is even in them to support the plaintiffs' contention, we will briefly refer to them.

The confusion apparently originated in the case of the Missouri Pacific Ry. Co. v. Sharitt decided in 1890, (43 Kans. 375), or rather in the concurring and dissenting opinions of that case. The case certainly seems to overrule, although not expressly doing so, the earlier case of Burlington & Missouri &c. R. R. Co. v. Thompson, 31 Kans. 180, in which Mr. Justice Brewer gave the opinion. Both involved the effect to be given by the courts of one state to the exemption laws of another, and the same consideration has always exerted a considerable influence upon this class of decisions.

See Mason v. Beebee, 44 Fed. Rep. 556.

But notwithstanding some statements to the contrary, the great weight of authority even in this class of cases is that a corporation doing business in more than one state may be held as garnishee wherever it can be sued by the principal defendant, especially if it has been compelled by statute to submit itself to the jurisdiction of that state in order to entitle it to do business therein :

Mooney v. Buford &c. Mfg. Co., 72 Fed. Rep. 32 (7th Cir. Ct. of Apps).

National Fire Ins. Co. v. Chambers, 53 N. J. Eq. 468.

Neufelder v. German Am. Ins. Co., 6 Wash. 336.

Lancashire Ins. Co. v. Corbetts, 165 Ill. 592.

Harvey v. Great Northern Ry. Co., 50 Minn. 405.
Railroad v. Barnhill, 91 Tenn. 395, 399.
Willard v. Sturn, 96 Iowa 555.
Campbell v. Home Ins. Co., 1 S. C. (N. S.) 158, 169, &c.
Howland v. C. R. I. & P. Ry. Co., 134 Mo. 474.
Morgan v. Neville, 74 Pa. 52.
Railroad v. Peoples, 31 Oh. 537.
National Bank v. Huntington, 129 Mass. 444.
Cousens v. Lovejoy, 81 Me. 467.
Burlington & M. R. R. Co. v. Thompson, 31 Kans. 180-195-196.
Selma &c. R. R. Co. v. Tyson, 48 Ga. 351.
Connor v. Hanover Ins. Co., 28 Fed. Rep. 549,
Hankinson v. Page, 19 Abb. N. C. 274. (Wallace J. in U. S. Cir. Ct).

And in Rhode Island in,
Moshassuck Felt Mill v. Blanding, 17 R. I. 297.

And see McBee v. Purcell Nat'l Bank, 37 S. W. Rep. 55. (Ct. of Apps. of Indian Ter).
Mason v. Beebee, 44 Fed. Rep. 556.

In some states the statute law has not in the past contained or does not now contain any provisions by which a foreign corporation can be served in garnishment, and in others they can be so served only under certain conditions. Of course these cases furnish no authority against the above cases, although they are frequently cited as such authority:

See National Bank v. Huntington, 129 Mass. 444.
American Exp. Co. v. Judge of Wayne Cir. Ct. cited in Moore v. Wayne Circuit Judge, 55 Mich. 84 at 89.
Bridge & Iron Works v. Circuit Judge, 73 Mich. 155, 157.
Morawetz v. Sun Ins. Office, 96 Wis. 175, 179.
Myer v. Liverpool &c. Ins. Co., 40 Md. 595.

Comp. Central Trust Co. v. Chattanooga &c. R. Co., 68 Fed. Rep. 693.
Craig v. Gunn, 67 Vt. 92.

National Bank of Wilmington vs. Of Patrick

A second class of these cases hold that such a corporation can be served in garnishment only in the jurisdiction where it has its domicile:

Reimers v. Seatco Mfg. Co., 70 Fed. R. 573, (6th Cir. Ct. App).
Douglass v. Phenix Ins. Co., 138 N. Y. 209.
Louisville & N. R. Co. v. Nash, 23 South. Rep. 825. (Ala. 1898.)
Renier v. Hurlbut, 81 Wis. 24.

(Attachment in Illinois of money due on judgment in Wisconsin).
See also Central Trust Co. v. Chattanooga &c. R. Co., Supra.
National Bank of Wilmington vs Pardee "

And Atchison &c. R. R. Co. v. Maggard, 6 Colo. App. 85, which although not a decision of a court of last resort, may perhaps be placed upon the same ground, though the discussion goes further.

The case of Craig v. Gunn, 67 Vt. 92, evidently either belongs with the the cases where there is not a sufficient statute for service of process, or with those holding that the corporation was not within the state in its corporate capacity, although in this case the garnishee operated a small piece of railroad within the state.

Compare Jones v. Dillihanty, 68 Vt. 490.
Nichols v. Hooper, 61 Vt. 295.

Compare also with this class of cases;
Lafayette Ins. Co. v. French, 18 How. 404.
Barrow Steamship Co. v. Kane, 170 U. S. 100.

A third class appears to go further;
Missouri Pacific R. Ry. Co. v. Sharitt, 43 Kas. 375, 378 et seq.
Illinois Cent. R. R. Co. v. Smith, 70 Miss. 344.
See Singer Mfg. Co. v. Fleming, 39 Neb. 679, 686-690.
Also Atchison &c. R. R. Co. v. Maggard, 6 Colo. App. 85.

The above review of cases in which corporations carrying on business in more than one state are garnishees shows that the only states which have, even in such cases, adopted anything like the plaintiffs' contentions are Kansas, Mississippi and perhaps Nebraska. But so far as known the courts of last resort in no state has as yet adopted the plaintiffs' contention in the case of an individual garnishee. The

lower court in Missouri for the District of St. Louis did so at one time, but these cases were afterwards overruled by the Supreme Court of that state in:

Wyeth Hardware &c. Co. v. Lang & Co., 127 Mo. 242.

E. Attachments of Debts Due in Another State and Before They Are Payable.

It was contended by the plaintiffs in error in the courts below, and the same may be repeated here, that because the debt attached was or may have been payable in Boston, and because the attachment was made before it was payable according to the contract of purchase between Brown, Steese & Clark and the Lippitt Woolen Company, the Rhode Island Courts acquired no jurisdiction by the attachment. It is submitted, however, that neither of these involves any Federal question. They are both questions of general law and practice only.

But be this as it may they were both decided in England, adversely to the plaintiffs' contention here, two hundred years and more ago.

The first of these contentions would destroy all advantage of garnishment against non-residents, which is frequently called foreign attachment from the very fact that it is commonly used to collect debts due from non-residents. It is, therefore, not surprising to find that it is well settled, both in England and in this country, that the place of payment is immaterial:

Andrews v. Sir Robert Clerke, Carthews Rep. 25.
Banks v. Self, 5 Taunt. 234.
Harington v. Macmorris, 1 Marsh. 33, 35; and 5 Taunt. 228, 232.
Locke on Foreign Attachment, pp. *29-30.

Blake v. Williams, 6 Pick. 286, 315.
Sturtevant v. Robinson, 18 Pick. 175, 179-180.
Nichols v. Hooper, 61 Vt. 295.

Campbell v. Home Ins. Co., 1 S. C. n. s. 158, 169-170.
Pomeroy v. Rand, NcNally & Co., 157, Ill. 176, 185-186.
East Tenn. &c. R. R. Co. v. Kennedy, 83 Ala. 462, 464.
H. & St. J. R. R. Co. v. Crane, 102, Ill. 249, 258.
Neufelder v. Ins. Co., 6 Wash. 336.

So also the principle of *debitum in presenti solvitur in futuro* has always been applied to garnishment proceedings both in the old English cases:

Robbins v. Standard, Siderfin 327.
Dalton & Selby's Case, 3 Leon. 236, (cccxxiv).
Pearse v. Calcott, Jones 406.
Self v. Kennicot, 2 Shower, Case 460.
1 Rolle's Abrid. Custom of London, p. 553, (G, 2).
See Lodges Case, 2 Leon. 156, (cxc).

And in the several states of this country; see cases cited in the opinion of the court below, (record p. 140), and the following additional:

Walker v. Gibbs, 2 Dall. 211.
Cottrell v. Varnum, 5 Ala. 229.
Clark v. Brown, 14 Mass. 271.
Palmer v. Noyes, 45 N. H. 174.
1 Freeman Executions, Sec. 165.
8 American and English Encycl. of Law, 1165-1166.

Even though, to ascertain the amounts, accounts have to be taken:

N. E. Marine Ins. Co. v. Chandler, 16 Mass. 275-278.
Ward v. Lawson, 6 Pick. 358.
Webb v. Peele, 7 Pick. 247.
Atwood v. Dumas, 149 Mass. 167-170.
Ronan v. Dewes, 17 Mo. App. 306.

III.

The Argument From Analogy.

The chief argument of the plaintiffs in error is one from analogy, that the location of personal property, especially of such intangible property as debts, follows the domicile of the owner, because it does so in certain other instances, as in taxation and distribution of intestate estates, &c. As hereinbefore suggested, it is submitted that this cannot prevail against the general recognition of the validity of the attachment of such debts under the principles of both the English law adopted in this country, and of international law and the doctrine of comity.

The argument however is not new, but never has prevailed. It was argued over a century ago in Hunter v. Potts, 4 T. R. 182, but it was not found necessary to then decide it. But the question did arise and was directly decided in Re Queensland &c. Co., L. R. 1891, 1 Ch. 536, and 1892, 1 Ch. 219, Supra, and is particularly referred to in the opinion of Mr. Justice North in the lower court. The court of Appeals treated it as wholly a question of international law or of comity.

The maxim "*mobilia personam sequuntur*," including both tangible and intangible personal property, was much used by the older writers of the civil and continental European law. "Of late years, however, "the current has set very strongly even in commercial countries, "towards enforcing the *lex situs* on the title to chattels:"

Westlake's Private International Law, §267.

As said by Ld. Loughborough, in Sill v. Worswick, 1 Hy. Blk. 690 Supra, "It is a clear proposition, not only of the law of England but "of every country in the world where law has the semblance of science, "that personal property has no locality."

See Ld. Wensleydale in Fenton v. Livingstone, 3 Macq. Sc. App. Cas. 547.

Ld. Brougham in Bane v. Whitehaven &c. R. R. Co., 3 Ho. Ld. Cas. 19.

Doglioni v. Crispin, L. R., 1 Ho. Ld. 301.

Its locality is a mere fiction of law, as this court has had occasion to frequently point out, and a fiction which will give way to the operation of local rights and obligations conferred or imposed by the law of other jurisdictions:

Green v. Van Buskirk, 7 Wall. 139, 150.
Hervey v. R. I. Locomotive Works, 93 U. S. 664, 671.
Pullman Car Co. v. Pennsylvania, 141 U. S. 18, 22.
State Railroad Tax Cases, 92 U. S. 575, 607.

Undoubtebly the fiction has a proper place in private international law where rights of title are derived directly from the owner, as for example, in the distribution of intestate estates, or the voluntary conveyance of property, and where no adverse rights under the *lex rei sitae* are invoked by strangers to the title. But there are so many instances in which rights invoked under the *lex rei sitae* prevail that the maxim may be said to have lost all force as a guiding principle where the rights of third persons are involved.

In all statements and discussions of it which have come under our observation, no distinction between tangible and intangible property is made and it is confidently submitted none can be made. For it is universally conceded that trustee process reaches tangible property, goods and chattels in the possession of the trustee or garnishee as well as intangible debts and credits. The Rhode Island statutes, (Record pp. 74-78), expressly recognize this, and both were attached in this case in the hands of the Lippitt Woolen Company, (See trustee's affidavit, Record p. 1). But unless a distinction is made between them this court has already decided all questions here in issue:

Reynolds v. Adden, 136 U. S. 348.
Security Trust Co. v. Dodd 173 U. S. 624

And in Booth v. Clark, 17 How. 322, it has certainly gone far to decide that a debt may have its *situs* at the domicile of the debtor. For while the earlier part of the opinion in that case is taken up with a discussion of the right of the local receiver to be recognized in a foreign jurisdiction, a right which was apparently assumed in the case of the assignee in insolvency in both Reynolds v Adden, supra, and in Crapo v. Kelly, 16 Wall. 610, the latter part of the opinion rests upon

the denial that the claim or debt was property within the State of New York at the time of the appointment of the receiver.

It may indeed well be doubted whether the refusal of the several states to recognize the right of foreign receivers, assignees in bankruptcy and insolvency, and executors and administrators, to sue in their courts is not in reality based upon the fact that they regard the property as being within their own territory, and under their own jurisdiction, for the protection of their own citizens. The refusal to permit these officials to sue in their representative capacity amounts to little if their title is recognized. The title to the property is the substance, the right to sue is but the shadow. It is believed and submitted that they are not permitted to sue because their title will not be recognized against other claimants, and that such is substantially the decision in Booth v. Clark.

Certainly debts and credits are regarded as having a *locus* at the domicile of the debtor so as not to pass to the assignee in bankruptcy or insolvency of another state; (See cases referred to and cited above under II, Second, b). And so too they have a similar locality for the purpose of ancillary administration:

Pinney v. McGregory, 102 Mass. 186.
Vaughn v. Barret, 5 Vt. 333.
Holcomb v. Phelps, 16 Conn. 127, 134.
Partnership Est. of Hy. Ames, 52 Mo. 290.
Atty. General v. Bouwens, 4 M & W. 171, 191.
See Wilkins v. Ellett, 108 U. S. 256.
Beers v. Shannon, 73 N. Y. 292, 298.

A debt from its very nature is incapable of actual seizure by attachment. All that can be done is to notify the person owing it not to pay his creditor until the action or suit begun by that process is determined. The procedure is in its nature equitable and very similar to an injunctive order of the court; and in some states, particularly in Virginia and Kentucky, it takes this form.

And in Massachusetts the statute extending the chancery jurisdiction to property &c. of a debtor "which cannot be come at to be attached or taken on execution in a suit at law against such debtor,"

(Pub. Stat. 1882, Ch. 151, Sec. 2, Clause 11), was, as originally enacted, (1851, Ch. 206), confined to suits against non-resident debtors; and since its change to apply to suits against all debtors, (in 1858, Ch. 34), has been repeatedly held to reach the property of non-residents:

Silloway v. Columbia Ins. Co., 8 Gray 199.
Davis v. Werden, 13 Gray 305.
McCann v. Randall, 147 Mass. 81.
Wilson v. Martin &c. Co., 149 Mass. 24; 151 Mass. 515.
Comp. Pettibone v. Toledo R. R. Co., 148 Mass. 411.

Compare also the Massachusetts statute of 1839, Ch. 158 for attachment of property of foreign corporations; and,

Ocean Ins. Co. v. Portsmouth Ry. Co., 3 Met. 420.
Danforth v. Penny, 3 Met. 567.
Natl. Bank of Commerce v. Huntington, 129 Mass. 444.

See also Bragg v. Gaynor, 85 Wis. 468.

And so under the general chancery jurisdiction in the absence of special statutes:

Earle v. Circuit Judge, 92 Mich. 285.
Dollman v. Moore, 70 Miss. 267.
Pendleton v. Perkins, 49 Mo. 565.
Quarl v. Abbett, 102 Ind. 233.
Montgomery v. McDermott, 83 Fed. Rep. 576.

Corporate stock is another illustration of the same principle. Shares of stock are incorporeal rights and choses in action much like ordinary debts, though more intangible. In a general sense they are the obligations of the corporation to pay to the holder a proportional share of its net assets upon winding up, and for the purpose of distribution as a part of his estate undoubtedly have their *situs* at the domicile of the owner. But for the purpose of attachment they can be reached only at the home of the corporation, and the process to reach them is, in effect, the same trustee process as that to reach other debts, a notice or warning to the corporation to hold the shares to meet the event of the action.

This is particularly so under the statute and practice in Rhode Island:

See the statute Ch. 208, pp. 22-23 of the record.

And although like statutes exist elsewhere we are not aware that it has ever been held that they do not reach stocks held by non-residents, as well as those held by resident debtors:

Cook on Stock, §§ 483-485.

In fact in all cases where the question of jurisdiction *in rem* arises between courts of different sovereignties, the material fact is the ability of the court to reach and control by its process the specific property, or in case of intangible property the person who has it within his power to dispose of that property. The courts of the domicile may determine *rights* to the property, whether tangible or intangible, but they cannot transfer the thing itself. The latter can only be done by the courts of the *lex rei sitae.*

Bar's International Law, (Boston 1883), §§ 58, 59, pp. 219-228.

And compare Callahan vs Woodbridge 171 Mass. 595.

Indeed this very case illustrates the impossibility of, fixing any other locality for the debt for purposes of attachment than that of the debtor garnishee. When the assignees of Brown, Steese & Clark sought, (in order, plainly, thereby to affect this action), to sue the Lippitt Woolen Company in the Superior Court of Massachusetts, the action to which they now ask that faith and credit be given, they found it impossible to obtain jurisdiction, either actually or constructively over that company except by resorting to the same process that is here impugned, (Record pp. 4 and 57). And it is very plain that had not that company voluntarily appeared, (and the record leaves no doubt collusively appeared), in the case, there could have been no judgment there *in personam* against it, but a judgment only against the debt or property attached, (if there really was any,—the record shows none), in the hands of Leonard the garnishee.

And not only did it thus voluntarily appear and simply bring to the attention of the court the fact that it had been garnished in Rhode Island, upon which, by the settled practice of Massachusetts, the case

must have been dismissed, or at least have been continued to await the result of the Rhode Island action:

Winthrop v. Carlton, 8 Mass. 456.
Hull v. Blake, 13 Mass. 153.
Amer. Bank v. Rollins, 99 Mass. 313.

but it *voluntarily submitted the whole case upon an agreed statement of facts;* and the course then taken by the Superior Court in reversing its original decision, which by the whole line of authority in Massachusetts was clearly right, and rendering the judgment it did upon the indemnity to the Woolen Company, and staying execution even against the property attached in the hands of the garnishee in Massachusetts, to which at least, if the plaintiff was entitled to any judgment at all, it was clearly entitled, was certainly anomalous and to us has always been incomprehensible.

(See Record pp. 1 to 27 and 34 to 70).

Conclusion.

In conclusion it is plain that to now hold, against this practically universal consensus of practice, that such proceedings are not due process of law, as the plaintiffs here contend, will be to abrogate and annul all these statutes and proceedings as applied to non-resident debtors, and to place all choses in action, (and we fail to see why not also all tangible personal property as well, for, as Ld. Loughborough said, legally it has no locality), beyond the reach of creditors except by compelling their assignment, if they can, through the local courts of the debtor's domicile.

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